

FWS/R3/AES

Memorandum

To: Regional Director, FWS, Fort Snelling, MN

Through: Assistant Regional Director, Ecological Services Operations-Fort Snelling, MN

Through: Chief, Ecological Services Operations-Fort Snelling, MN

From: Regional HCP Coordinator, Ecological Services Operations-Fort Snelling, MN

Subject: Set of Findings: The Magic Carpet Woods Association Incidental Take Permit in Leelanau County, Michigan (TE 025433)

On March 29, 2000, the U.S. Fish and Wildlife Service (Service) received an application for an incidental take permit under the Endangered Species Act (Act) from the Magic Carpet Woods Association (Association). In accordance with the regulations, a Habitat Conservation Plan (HCP) accompanied the permit application. Additionally, the Association prepared, in coordination with the Service an initial draft Environmental Assessment (EA) that accompanied this HCP. A *Federal Register* Notice announcing receipt of the permit application, and soliciting comments on the application, was published on April 20, 2000. A second draft EA was developed, primarily by Service, personnel, in response to public comments. Notices regarding the availability of the revised draft EA were published on November 13 and December 15, 2000. The comments received during the second opportunity for public review and responses to those comments were incorporated into the final EA. This memorandum constitutes a Set of Findings for processing the application and describes the Service's rationale for making a recommendation to issue an incidental take permit to the Association.

**I. DESCRIPTION OF PROPOSAL**

The Association has applied to the Service for a permit to incidentally take piping plover (*Charadrius melodus*) under the authority of Section 10(a)(1)(B) of the Endangered Species Act of 1973, as amended (Act). The permit duration is 25 years. The Association's HCP includes adequate mitigation for adverse effects the proposed action may have on the piping plover and on Pitcher's thistle (*Cirsium pitcheri*), a threatened plant found on the property.

The Applicant proposes to restrict activities on the Association's beach to minimize impacts to listed species. The take anticipated includes the harassment of foraging piping plovers by domesticated pets, potential indirect habitat changes resulting from human use of the beach area of the property, construction of boardwalks from individual lots to access the beach, and potential increase of piping plover predators resulting from human occupation of the property. The geographic limit of the HCP includes all portions of the Association property located in Section 14, Leelanau Township, Leelanau County, Michigan.

## **II. SECTION 10(a)(2)(A) HCP CRITERIA - ANALYSIS AND FINDINGS**

### **1. The impact that will likely result from such taking**

The HCP, EA, and Implementing Agreement adequately describe the proposed activities and the anticipated impacts to the piping plover and pitcher's thistle and the associated habitat within the project area. The piping plover has been documented nesting approximately one-half mile east of the Property on Leelanau State Park. Given the proximity of breeding piping plovers to the Property, the potential use of the Property foraging plovers, and the potential for coastal processes to create suitable nesting habitat on the Property sometime in the future, the Service has taken the position that incidental take of the plover or its habitat may occur as a result of human use of the beachfront and indirect effects of the residential home construction. Although there is no current record of plover use of or occurrence on the Property, the beachfront area is considered foraging habitat. In addition, the beach frontage of the Property (outside the construction area) is included in the proposed designation of critical habitat for the piping plover by the Service (65 *Federal Register* 41812, July 6, 2000). The Association has prepared an HCP to address the potential effects of residential use and occupancy on the piping plover. The HCP provided sufficient information for the Service to evaluate the impacts of the proposed activities. The Service's analysis of the project impact is described in the Biological Opinion.

### **2. The steps that will be taken to monitor, minimize, and mitigate such impacts, the funding that will be available to implement such steps, and the procedures to be used to deal with unforeseen circumstances.**

The applicant's HCP provides measures to avoid or minimize harm to individuals, mitigation measures to compensate for potential losses, and a monitoring program to avoid potential disturbances to piping plovers within the project area. Monitoring will include:

- The Association will ensure that biological monitoring of piping plover use of the property, including nest/brood protection, is conducted in accordance with methodology and content agreed upon by the Service and typically used elsewhere for the Great Lakes population. Biological monitoring generally will include repeated searches for nesting activity and continuing observations of any plover foraging or breeding, observations of alterations to shoreline characteristics that could

increase or decrease apparent habitat suitability, and interactions between plovers and humans or pets that could impact plover use of the property.

- The Association will participate in current FWS-endorsed monitoring efforts and allow monitoring team access to the property shoreline. This existing monitoring program will expand its current efforts to include the Magic Carpet property, thereby providing information in the same format and detail that is currently provided to the Michigan Department of Natural Resources (MDNR) Endangered Species Program and to the Service.
- In the event the existing monitoring program discontinues its efforts sometime in the future or if its efforts do not include the Magic Carpet property, the Association will identify and use, in coordination with FWS, other monitoring programs in Cathead Bay (e.g. by the State Park or the Michigan DNR), and ensure continued biological monitoring. If no existing or ongoing monitoring programs are available for cooperative efforts, the Association will contract with a qualified consultant, in coordination with FWS, to perform seasonal biological monitoring. Any party performing the monitoring program will submit for the Service's approval an appropriate survey protocol prior to conducting surveys.
- Biological monitoring and protection will occur between the last week in April and the end of June or until all piping plover chicks hatched from nests on or within 0.5 miles of the project property are 35 days old. Monitoring includes the process of searching for nests in the Cathead Bay area. The total amount of time spent monitoring the property and the daily and weekly distribution of monitoring will be in accordance with the current protocol used for the existing piping plover monitoring program.
- Piping plover nests found on the project (Association) property will be accorded the same protection from disturbance and predation provided for nests on public property in the Great Lakes region. Plover monitors or stewards will be permitted to erect predator exclosures and close the surrounding beach area to human entry with psychological fencing. The closed, fenced area will extend about 100 m beyond each nest parallel to the shoreline and from the toe of the foredune to the waterline. During the approximately 30-day period when a nest is being incubated, human traffic may pass the nest by walking between the lake waterline and the fencing. During nest incubation and during the rearing period prior to chick fledging, the Association will maintain regular daily or near daily contact with the plover steward/monitor to keep informed of brood movements and behavior.
- The Association will provide suitable funding to cover the incremental expenses associated with extending the existing monitoring program to the Magic Woods property or for an independent monitoring and protection program in the event an existing program is not available for operation on the property. The critical monitoring period extends from the last week in April through the end of June in the event no nests are found at Cathead Bay, including the project property. If nests are found by the end of June on or within 0.5 miles of the property, monitoring and protection will extend until chicks are 35 days old.
- If piping plovers nest on the property, the Association will ensure that an on-site steward is present to aid in creation and maintenance of nest exclosures, discourage human, pet, and predator activities near nest sites, and help educate homeowners of plover issues. As with the biological

monitoring, the Association will, to the extent possible, work with the existing stewardship program conducted by the Michigan Department of Natural Resources, Wildlife Division.

- The Association will be responsible for ensuring that nest searching occurs through the end of June each year. The Association is also responsible for ensuring that nest protection and/or stewardship activities are conducted on the Magic Carpet property if plovers are observed nesting on or within 0.5 miles of the property during the period beginning with the last week in April and extending until the end of June each year or until all piping plover chicks hatched from nests on or within 0.5 miles of the project property are 35 days old.
- In the event the existing stewardship program ends in the future or its efforts do not include the Magic Carpet property, the Association will, in coordination with FWS, work with other stewardship programs in Cathead Bay (e.g. by the State Park), if any, or will contract with a qualified individual to provide these services for the Magic Carpet property.

Potential impacts of the permitted activity will be minimized by:

- c Establishing a protective setback from the ordinary high water mark (OHWM) of Lake Michigan where potential habitat will remain in its natural state.
- Alteration within the 80-foot setback area is limited to removal of fallen, dead, diseased or dangerous trees, and selective trimming of trees to provide a filtered view of the water.
- Boardwalks or walkways to the shoreline will minimize human-caused dune erosion and avoid disturbance or damage to federal and state protected plant species.
- Towering structures and activity platforms are not allowed along any portion of the shoreline.
- No satellite dishes are allowed from the shoreline through the open dune area.
- No bird or animal feeders are allowed in the shoreline through open dune area.
- Removal or planting of vegetation in the active dune area is prohibited.
- Disturbance to the existing active dune area through alteration of sand, gravel, rocks, water, or plants is prohibited.
- Major construction activities will be completed prior to limited removal of trees and shrubs lying between construction activities and the shoreline.
- Docks will not be permitted.
- All pets must be restrained or under direct control at all times while outside and must be on a leash when on the beach during the critical nesting period.
- Access to the beachfront of the site condominium property by FWS or MDNR representatives to observe or monitor piping plovers will be permitted provided reasonable notification of the timing and extent of the survey(s) is given to the primary contact of the homeowners association (Association). This contact will notify individual lot owners of the survey(s). FWS or MDNR representatives will be provided access to the entire beachfront owned by members of the Association.
- All occurrences, if any, of piping plovers on the property as detected by monitoring provided or supported by the Association or other source will be promptly reported to the FWS.

- Throughout the year, garbage will be placed in covered animal-proof containers stored in an area within the forest to minimize attracting potential plover predators to the beach. Garbage or unenclosed food will not be left unattended along the shoreline.
- c As per deed restrictions, lot owners are required to permit the construction and maintenance of exclosures around plover nests on their property as deemed appropriate and necessary by the plover stewardship program. Lot owners will not be individually responsible for constructing, maintaining, or funding such exclosures.
- Off-road vehicles or any other motorized vehicles will not be permitted in the active dune area or on the beachfront at any time and use of jet skis will be restricted.
- The homeowners Association created by the Magic Carpet Woods Development Master Deed and referenced bylaws will implement the measures listed in this HCP. The Association will have a single point of contact (most likely the president) for interaction and information exchange with the Service. The Association will consist of the 13 homeowners with Lake Michigan access. The Association will also use its regulation adopting power, as set out in Section 6.6 of its bylaws, to enact the conservation measures called for in this HCP that are not already incorporated into the Master Deed and Association Bylaws (EA/HCP Appendix 10.4). Participation in the Association will be required through the deeds associated with each lot. Lot 14, which has no frontage on or access to Lake Michigan, will not be part of the Association.
- Lot owners are required to advise all visitors, renters and lessees of the plover protection measures and restrictions in this HCP and related documents, including the Master Deed and Association Bylaws. Lot owners will have ultimate responsibility for ensuring that visitors, renters and lessees comply with measures contained in these documents.
- During the critical nesting period (last week of April through end of June or until all piping plover chicks hatched from nests or within 0.5 miles of the project property are 35 days old), if nesting is known to occur within 0.5 mile of specific lots, any picnic sites on the beach must be promptly cleaned up and policed at the conclusion of the picnic. No picnics or any activities (except for fencing and exclosure installation, removal, or maintenance or other nest or piping plover protection or monitoring activities) are allowed in a fenced and posted nesting area. Fires and the use of fireworks and firearms will not be allowed during the critical nesting period or until all chicks are 35 days of age.
- During any road and home construction activities that may occur during the nesting/breeding season, the lot owner is required to inform any contractor and all employees that they are not allowed on the beach, that no pets are allowed at the construction site, and that all trash must be properly disposed of in secure containers. The requirement of each lot owner to undertake this step will be expressly identified in the deed to each lot.

Measures to mitigate impacts include:

- If the MDNR, Service, Association, plover steward(s), or biological monitor(s) determine (1) that mammalian predators (excluding domestic dogs and cats) pose a threat to plovers in the Property vicinity, (2) that the predators should be removed from the area or exterminated, and

(3) that an effective means of removing or exterminating the predators is to use the Property for such purposes, then the Association will allow the MDNR, Service, or a mutually agreed upon party to access the Property to conduct trapping/exterminating activities. The Association will be responsible for expenses associated with predator removal/extermination if it is reasonably determined by the MDNR, Service, plover steward(s) or biological monitor(s) that activities occurring as a result of the Magic Carpet Woods project are primarily responsible for occurrence of the predators.

- As additional mitigation, the Association will contribute, upon the first sale or transfer of ownership of each of the 13 lots with Lake Michigan frontage, \$1,000 at the time each individual lot is first sold or ownership transferred. The total mitigation funding amount will not exceed \$13,000 in aggregate, and no more than \$1,000 will be required in mitigation contribution for any individual lot. The sums so contributed will be invested in a trust account, with the balance and income from the trust account used to fund piping plover research, monitoring, or recovery efforts conducted in the Great Lakes region. The balance at all times will not be less than \$5,000. The trust proceeds will be forwarded to a qualifying educational or charitable institution (such as a university or non-profit environmental education foundation) mutually agreed upon by the Association and the Service. The Service shall approve all funded projects or use of funds. The Service may also accept other sources of contributions to the trust account (including mitigation contributions from other piping plover incidental take permits that may in the future be issued for the Great Lakes population), the income from which will be combined with and used for the same purposes as the Association's contributions.

The funding available for each step is provided:

- At the conclusion of each breeding season, members of the Association will be required to contribute an annual assessment to the Association in order to cover expenses incurred as part of the plover monitoring, protection and mitigation program. The cost will be assigned, in coordination with FWS, once the expenses for the monitoring program are determined.

The treatment of unforeseen circumstances in the HCP (Section 7.4) is consistent with the Service's Habitat Conservation Plan Assurances ("No Surprises") Rule, dated February 23, 1998.

### **3. Alternative actions to the taking the applicant considered and the reasons such alternatives are not proposed to be utilized**

Alternatives to the proposed project are fully described in the EA. Development of a residential project in another area of the Leelanau peninsula without Lake Michigan frontage and as a result, without impact to the piping plover (no take) was considered. This alternative assumed the applicant could equitably divest the subject property and place the project elsewhere thereby removing the potential for take of the plover arising from the effects of residential use and occupancy. This alternative was found not practicable and was not considered in detail. The EA is limited to analysis of a range of reasonable alternatives selected to reflect several development scenarios, with or without an

ITP and HCP. Five alternatives were fully evaluated in the EA. Under the No Action alternative, the Service would not issue an ITP and no HCP would be implemented. Construction and occupation of houses on 13 or 14 individual lots in the same manner and locations described in the Proposed Action would still take place on the property. No restrictions regarding piping plover protection would be placed on any owners. The proposed action is the issuance of an ITP under section 10(a)(1)(B) of the Act to authorize the incidental take of endangered Great Lakes piping plovers that might occur from the human use of the beachfront area attributable to construction and occupancy of residences and limited boardwalk construction on Association property. The other alternatives evaluated more and less lots under an HCP and the same number of lots under a general deed restriction. Both HCP alternatives were equally protective of the piping plover as the proposed action. However, the Alternative which called for the sale of fewer lots would likely produce a major economic loss for the property owners. An in-depth economic analysis was not provided, since the Applicant considers most of this information to be proprietary. However, consultation with local appraisers supported the contention that sale of fewer lots on the property likely would result in a significant economic loss for the owners. The general deed restriction alternative provides less protection to the piping plover than the proposed action.

#### **4. Other measures that the Director may require as being necessary or appropriate for the purposes of the plan**

The Applicant has modified the HCP as a result of public comments and consultations with the Service. These modifications included minimization and mitigation measures and the provision of mitigation funding that the Service determined to be necessary and practicable to minimize and mitigate take.

### **III. ENVIRONMENTAL ASSESSMENT AND PUBLIC COMMENT - ANALYSIS AND FINDINGS**

The Service prepared the EA for this ITP application request. A Notice of Availability was published in the *Federal Register* on April 20, 2000 notifying the public of the availability of the EA and HCP for public comment accepted through May 22, 2000. During the comment period, the Service received 44 comments from citizens, mostly in opposition to the proposed permit. The Service compiled public comments and as a result of the comments, made appropriate changes to the HCP and EA. A Notice of Availability was published in the *Federal Register* on November 13, 2000 announcing the availability of a revised draft HCP and EA. Written comments were solicited and accepted through December 13, 2000. The Service published in the *Federal Register* on December 21, 2000 a Notice extending the comment period to January 22, 2001. During the comment period, the Service received 43 comments from citizens. A total of thirty-seven opposition issues to the revised draft EA and/or the HCP are documented with Service responses in Section 7 of the final Environmental Assessment. They are therefore not repeated here.

#### **IV. SECTION 10(a)(2)(B) PERMIT ISSUANCE CRITERIA - ANALYSIS AND FINDINGS**

##### **1. The taking will be incidental.**

The Service finds the take will be incidental to the otherwise lawful activities occurring as a result of developing property adjacent to Lake Michigan for single family dwellings.

##### **2. The Applicant will, to the maximum extent practicable, minimize and mitigate the impacts of the taking.**

The Service finds the Applicant has developed an HCP pursuant to the requirements provided in the Act and its implementing regulations and has provided for mitigation and minimization of take to the full extent necessary. The "maximum extent practicable" concept consists of consideration of the economic objectives of the applicant (reflected by the scope of the project and its design), a measurement of the subsequent impact imposed on the protected species, and the degree to which the extent of mitigation and minimization measures offered in the HCP compensate for potential or likely impact to the species. Minimization efforts do not take precedence over mitigation efforts or vice-versa. Minimization and mitigation can take many forms and any combination to address direct, indirect, and cumulative adverse effects on listed species. In this particular case, the level of incidental take is expected to be low once measures of the HCP and permit are in place, and the Applicant has provided mitigation and minimization to offset the expected impacts to the affected species. The Service's Biological Opinion described the incidental take likely to occur under this ITP as low level harm or harassment not likely to appreciably affect the survival and recovery of the Great Lakes population and not likely to result in jeopardy to the species or in destruction or adverse modification of critical habitat.

##### **3. The Applicant will ensure that adequate funding for the conservation plan and procedures to deal with unforeseen circumstances will be provided.**

The applicant is committed to funding implementation of the HCP through the sales of individual lots. The permit will be conditioned such that if the Applicant does not provide adequate funding for the proposed conservation plan and/or permit conditions, an enforcement action against the Applicant by the Service will ensue. Such action could lead to permit suspension or revocation. The Service's HCP Assurances ("No Surprises") rule is discussed in the HCP and measures to address changed and unforeseen circumstances have been identified. Unforeseen circumstances would necessitate coordination between the Service and the Applicant. The Applicant has committed to a coordination process to address such circumstances. The Service has therefore determined the financial commitment, along with the willingness to address changed and unforeseen circumstances in a cooperative fashion, is sufficient to meet this criterion.

**4. The taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.**

The Service has reviewed issuance of an ITP to the Association in accord with Section 7 of the Act to cover activities associated with lot development and HCP/Permit maintenance. As concluded in the Biological Opinion, the ITP will not appreciably reduce the likelihood of survival and recovery of piping plover in the wild or adversely modify its habitat. In addition, the ITP will not jeopardize the continued existence of the Pitcher's thistle.

**5. Additional measures as required by the Director of the Service will be implemented**

The EA and HCP have incorporated all elements necessary for issuance of a Section 10(a)(1)(B) permit.

**6. The Director of the Service has received the necessary assurances that the plan will be implemented**

The permit will be valid only if the minimization and mitigation measures have been carried out in accordance with the HCP and the terms and conditions of the permit. Failure to perform the obligation outlined by the conditions of the Section 10(a)(1)(B) permit may be grounds for suspension or revocation of the permit.

**V. GENERAL CRITERIA AND DISQUALIFYING FACTORS - ANALYSIS AND FINDINGS**

The Service has no evidence the permit application should be denied on the basis of criteria and conditions set forth in 50 CFR § 13.21(b)-(c).

## VI. RECOMMENDATIONS ON ISSUANCE OF PERMIT

Based on the findings of the Regional Office staff and the East Lansing, Michigan Field Office staff, and with respect to the ITP application, HCP, EA, and biological opinion, we recommend the issuance of the Section 10(a)(1)(B) ITP to Magic Carpet Woods Association.

/s/ Charlie Wooley  
Charlie Wooley  
Assistant Regional Director - Ecological Services

3/2/01  
Date

/s/ T J Miller for  
Peter Fasbender, Regional HCP Coordinator

3/02/01  
Date